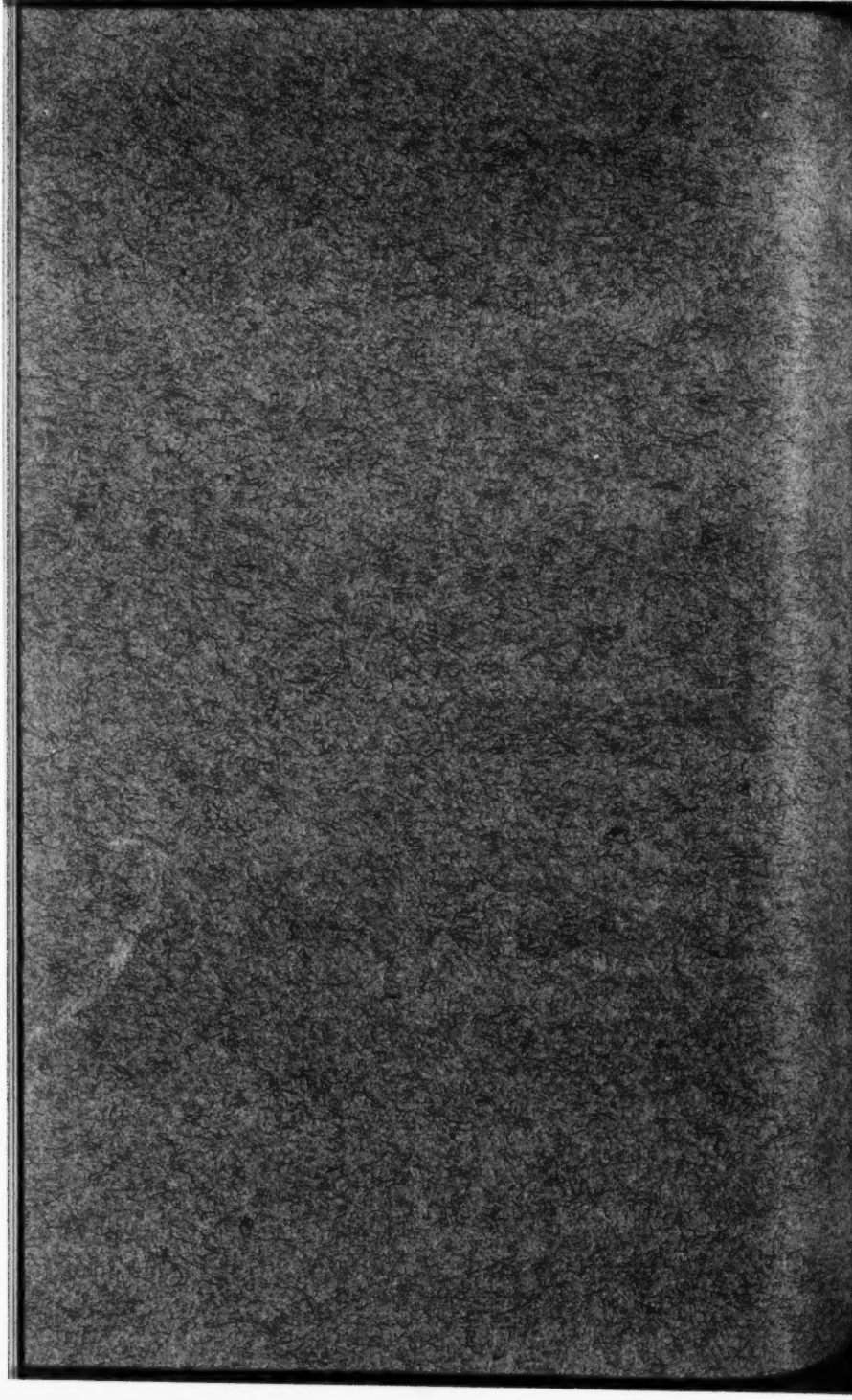

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 513

COOPERSTOWN CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 16–19) is unreported; the opinions of the Circuit Court of Appeals (R. 40–43, 27–30) are not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 30, 1944 (R. 44). The petition for a writ of certiorari was filed on September 27, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a corporation voluntarily pays a tax for which it is not liable, may the amount paid be deducted as "Taxes paid" under Section 23 (c) of the Revenue Act of 1936?

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 6–9.

STATEMENT

The Board of Tax Appeals found the facts (R. 16–17) as they were stipulated (R. 13–15). They may be summarized as follows:

Taxpayer, a Delaware corporation, kept its books and made its returns of income and personal holding company surtax upon the basis of cash receipts and disbursements, the returns being filed with the Collector of Internal Revenue at Newark, New Jersey (R. 17). In 1937, taxpayer filed with the Collector a capital stock tax return reporting a capital stock tax liability of $7,000; the Commissioner assessed the tax so reported; and taxpayer paid it. Taxpayer then took a deduction on its income tax return for the calendar year 1937 [filed in March 1938 (R. 42, 15)][1] for the $7,000 so paid. (R. 17.)

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[1] The tax return reveals (R. 15) that the first payment was made on March 15, 1938, presumably the date the return was filed. The taxpayer has never contested the Government's view that the deficiency notice of March 11, 1941 (R. 6), was timely under the three-year statute of limitations (Appendix, *infra*, p. 9).

On April 27, 1938, taxpayer filed in the office of the Collector of Internal Revenue a claim for refund of the capital stock tax on the ground that it was not engaged in business during the calendar year 1937 and was not liable for payment of capital stock tax for that year (R. 17).

The Collector advised the taxpayer on October 27, 1939, that its claim for refund was allowed and on November 3, 1939, the Collector paid taxpayer $7,000, together with interest thereon as provided by law (R. 17).

Taxpayer filed an income tax return for the calendar year 1939 in which it included as income received the $7,000 of refunded capital stock tax together with the interest paid it thereon, and taxpayer paid income tax for 1939 thereon (R. 17).

The Commissioner determined that, since taxpayer was not subject to a federal capital stock tax in 1937, the deduction taken on its income tax return for a 1937 capital stock tax would not be allowed (R. 8–9, 17). The date of the deficiency notice was March 11, 1941 (R. 6). The Board of Tax Appeals sustained the Commissioner's determination (R. 18–19). The Circuit Court of Appeals affirmed (R. 40–43).

ARGUMENT

The capital stock tax was imposed by Section 105 of the Revenue Act of 1935, c. 829, 49 Stat.

1014, "upon every domestic corporation with respect to carrying on or doing business * * *." Every corporation liable for the tax was required to file a return by a designated date and the tax was required to be paid without assessment on or before the expiration of the period for filing the return.

Taxpayer paid a capital stock tax in 1937 and subsequently filed a claim for refund on the ground that it was not liable for the tax. The claim was promptly allowed and the payment made was refunded. (R. 14, 17.) Accordingly, it is here agreed that the taxpayer was not liable for the capital stock tax. Moreover, there never was any disagreement upon that point.

This is not a case where a tax was paid upon the demand of a Collector and the non-liability was subsequently determined upon the termination of a controversy. The decision below rests upon the narrow ground that the payment represented the taxpayer's own voluntary appraisal of its liability and that the acceptance of the tax by the Collector and the assessment which automatically followed the filing of the return are not equivalent to a demand by the Government.

The court below distinctly held that the absence of liability during the taxable year was the basis of its decision and that this is not a case of relating back a subsequent event. None of the cases relied upon by the taxpayer involved this situation and they are, therefore, clearly distinguishable and there is no conflict.

The recent decision in *Dixie Pine Co.* v. *Commissioner,* 320 U. S. 516, 519, makes it plain that the right to a deduction depends upon the concurrent existence in a given year of all the essential elements "which fix the amount and the fact of the taxpayer's liability * * *", for otherwise the income of that year would not be truly reflected. In that case the missing element was the acknowledgement of liability, but payment without a liability should no more entitle a taxpayer to a deduction than did liability without an acknowledgment in the *Dixie Pine* case.

Taxpayers should not be permitted, by paying voluntarily take which they do not owe, to secure the benefit of deductions which are intended to take into account only actual tax liabilities.

CONCLUSION

The case was correctly decided below. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1944.